No. 13139

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL NO. 7, AFL, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended,[1] for enforcement of its order of December 15, 1950, issued against the International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL, herein called the Union, following the usual

[1] 61 Stat. 136, 29 U.S.C. Supp. IV, Secs. 151, *et seq.* Relevant portions of the Act appear in the appendix, *infra,* pp. 21-23.

proceedings under Section 10 of the Act. This Court has jurisdiction of these proceedings under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at Seattle, Washington. The Board's decision and order (R. 45-54, 20-44) [2] are reported at 92 NLRB 753.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

A. The Commerce Data

E. E. Saberhagen, an individual doing business as Chas. R. Brower and Co., herein called the Company, is engaged in Seattle, Washington in the distribution and installation of insulating materials used in building construction and upon seagoing vessels (R. 22-23; 62-63). At various shipyards located in Washington, the Company during its 1949 fiscal year installed insulation material on seagoing vessels belonging to concerns engaged in interstate commerce, such as Luckenbach Steamship Company, Northland Transportation Company, and the Army Transport Service (R. 23; 62-64). It also did insulation work in industrial and building construction projects in Seattle and in Portland, Oregon (R. 23; 62, Tr. 22).[3] During the year 1949, it purchased goods and materials valued at approximately $200,000, of which 90 percent came from outside the State of Washington, and it received a gross income

[2] References to portions of the printed record are designated "R." Those references preceding a semi-colon are to the Board's findings and those following a semi-colon are to the supporting evidence.

[3] "Tr." refers to occasional references to the original transcript of the testimony certified to the Court but not included in the printed record.

from its installation work in excess of $500,000 (R. 23; 11, 18, 63-64). Of its income, about $60,000 was for materials furnished and services rendered on vessels, 90 percent of which moved in interstate and foreign commerce (R. 23; 63-65, 105). In addition, the Company was a member of an association-wide bargaining group of employers (*infra*, p. 4). The Board found that the operations of the Company affect commerce so as to confer jurisdiction on the Board to redress unfair labor practices obstructing them (R. 23).[4]

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[4] In view of the magnitude of the interstate and foreign facets of the Company's commerce, the Board's assertion of jurisdiction was clearly proper. *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675, 683-685; *Local 74* v. *N.L.R.B.*, 341 U.S. 707, 712; *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694, 699; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 381-383 (C.A. 9), certiorari denied, 341 U.S. 909.

Before the Board, the Union argued that, because the Company official who testified could remember the precise figures on only one specific job (R. 64-65), the record showed a figure of only $6,000 as services performed on ships carrying interstate and foreign commerce. Aside from the fact that this contention ignores the Company's $180,000 extra-state purchases, the work done in Portland, Oregon, and its membership in an association-wide group, alone sufficient for jurisdictional purposes, the contention is unsound. Although the witness either did not know the various owners or could not "give any exact figure" for individual concerns (R. 64-65), he did testify that he knew the vessels worked on to be of "a large type . . . engaged in offshore and intercoastal trade" (R. 65) and that 90 percent of the Company's shipyard work was on such seagoing vessels (R. 63, 64).

The Union also argued that the restrictive closed-shop provisions of the contract, which gave rise to the discrimination involved in this case, had not been applied to jobs affecting commerce. Nothing in the record supports this assertion, and in view of the fact that the terms of the contract have been fully applied to insulation jobs being performed on ocean-going vessels, as exemplified by the discrimination against the six employees in this case (*infra*, pp. 7-10), this contention is factually without merit (R. 32). In any event, an integrated enterprise cannot be divided into its local and interstate facets so as to defeat the exertion of jurisdiction in the intrastate part considered in isolation. *Hearst Publications* v. *N.L.R.B.*, 136 F. 2d 608, 610 (C.A. 9), affirmed in this respect, 322 U.S. 111.

Finally, addressing itself to the Board's discretion to decline jurisdiction (*Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 187 F. 2d 418

B. Background to the Unfair Labor Practices

The unfair labor practices in this case pertain to the discrimination in employment practised by the Union against non-members pursuant to an invalid closed-shop agreement. Accordingly, it is necessary at the outset to state, (1) the terms of the closed-shop agreement, and (2) the system of employment which prevailed.

1. *The closed-shop agreement*

The Company is a member of the Seattle Construction Council, an association of employers of craftsmen and labor which acts collectively in labor relations for its members (R. 23; 65-66, 73-74). On June 30, 1943, the Seattle Construction Council, representing all of its members including the Company, entered into an agreement with Seattle Washington Buildings and Construction Trades Council, an association of construction labor organizations of which the Union is one (R. 24; 66-72). Under paragraph 9-a of this contract, it was agreed that the employers would "employ none other than members of the Party of the Second Part [Trades Council], as enumerated in Schedule 'A' attached hereto entitled WAGE SCHEDULE" (R. 24; 71). Included in this schedule was the work classification of

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(C.A. 9), certiorari denied, 342 U.S. 815), the Union unsuccessfully urged the Board not to assert jurisdiction in this case. As this Court has held, "Providing that the Board acts within its statutory and constitutional power, it is not for the courts to say when that power should be exercised." *N.L.R.B.* v. *Townsend,* 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U.S. 909; see also, *International Brotherhood of Electrical Workers* v. *N.L.R.B.,* 181 F. 2d 34, 36-37 (C.A. 2), affirmed 341 U.S. 694, 699; *N.L.R.B.* v. *Mid-Co Gasoline Co.,* 183 F. 2d 451, 453 (C.A. 5).

"asbestos workers," the group represented by the Union (*ibid*).

This agreement contained an escalator or cost-of-living wage clause by which wages were to be determined for the period from January 1, 1944 through January 1, 1947 (R. 24; 66-68). The duration clause applicable to this escalator wage provision reads as follows (R. 25; 68-69):

> Paragraph 4 [escalator wage provision] of this contract shall remain in effect until January 1, 1948 unless notice is given 90-days prior to July 1, 1947 and *shall renew itself from year to year thereafter,*—Provided that wages shall be adjusted from time to time as provided for in Paragraph 4. (Emphasis supplied.)

The duration clause pertaining to all other employment conditions specified by the contract provides as follows (R. 25; 69):

> All other conditions of this Agreement shall take effect on July 1, 1943, and *continue in effect thereafter from year to year* until changed by the mutual agreement of the parties as provided herein. Proposed changes or modifications of this Agreement shall be made by either party giving notice thereof in writing to the other party at least 90-days before July 1, and such notice shall specify the provisions desired to be changed and shall state the time and place at which negotiations may commence. The other party shall enter into negotiations not later than 30-days from the date of the receipt of said notice, after party has notified the other in writing of proposed modifications and changes in this Agreement. In the event no accord can be reached

> in the succeeding 60-days, arbitration as provided hereinafter shall be resorted to. (Emphasis supplied.)

The method of arbitration provided that, upon the exhaustion of certain intermediate steps without reaching agreement, three umpires were to be selected, one by each party and a third by the U. S. Department of Conciliation whose choice had "to be satisfactory to both parties," and the umpires' decision was to "be final and binding upon both parties" (R. 26; 70).

Through the date of the hearing before the trial examiner, held on September 6, 1950, this agreement remained in full force and effect without any modification (R. 26; Tr. 27, 16). Accordingly, by its terms, the wage provision of the agreement, beginning with January 1, 1948, had twice "renew[ed] itself from year to year," and the other provisions of the agreement, beginning with July 1, 1944, had seven times "continue[d] in effect . . . from year to year." The instances of actual discrimination against non-members of the union took place between December 1949 and February 1950 (*infra,* pp. 8-10), after these successive renewals of the agreement.

2. *The prevailing system of employment*

Insulation jobs, whether installation or repair, are of short duration, employees working on numerous small jobs lasting but a few days at a time (R. 27; Tr. 119, R. 87). As the work comes up, the contractors call the Union for the requisite number of workers whom the Union dispatches as requested (R. 27; 77, 100). Generally all asbestos workers are dispatched by the Union

upon request from an employer although it is also permissible for the men to locate the job and then to secure clearance from the Union before starting work (R. 27; 106, 80-81). Such clearance, however, is essential before the worker may be employed (R. 27; 102, 93-94, 99, 81, Tr. 110).

For over ten years, the Union has had, and now has, a membership of approximately 41 persons; members of the Union are known as "card men" (R. 27; 77). The Union also permits "travelers"—card men from other locals in the same International Union—to work in the Seattle area (R. 27; 93-94, Tr. 110). A final category of asbestos worker is a "permit man"; a permit man is an individual authorized by the Union to work at his craft but who is not accorded membership in the Union (R. 27; 77). During the war years as many as 350 men were granted permits to work by the Union (R. 27; 111). Since the end of hostilities, as ship construction and repair work dropped off, the number of permit men has correspondingly diminished (R. 27; 109, 110-111). The Union's discrimination in this case was directed at the last of the permit men.

C. The Discrimination In Employment Practised By The Union Against The Non-Members

With the tremendous increase in shipbuilding and ship repair in the Seattle area during the war, the Union, in order to overcome the resulting shortage of insulation workmen, approached other AFL locals in the vicinity seeking volunteers (R. 27-28; 99). From such sources, the Union recruited, among others, six employees named Sidney A. Lennox, Toive E. Eskola,

Uhro A. Kangas, Alfred J. Vollan, Leroy D. Lucy, and Marvin N. Rosand. All were members of other AFL craft unions in the Seattle area, and the Union allowed them to work as asbestos workers under permit (R. 28; 98, Tr. 36-37, 50, 66, 80-81, 90). These men began their insulation work between the years 1940-1943, and have made their livelihood from it ever since, returning to their original craft only when there was no insulation work to be done, a definite minority of the time (R. 28; 88, 86). Throughout their tenure as insulation workers, each worked under permit from the Union, paying all the dues required by the Union either directly to the latter or indirectly to the local to which each belonged (R. 28; 78-79, 83, 89, 98-99, Tr. 90).[5] None has worked without clearance from the Union and until either September 1949, or February 1950, they were dispatched by the Union's business agent in the same manner as the card men (R. 28; 94, 90, 85, 79-81, 99).

Employee Arthur Lennox performed his last work in the insulation trade in September 1949, at which time he was laid off at the completion of a job (R. 29; 79, 82).

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[5] Three of the men, Lennox, Eskola, and Kangas, made application on one or more occasions between 1947 and 1949 for membership in the Union (R. 28-29; 83, 88-89, 78). Each of these applications was rejected by the Union, which has accepted only two new members in the past year and a half or two years (R. 28-29; 83, 89, 111). Gagner, the Union's business agent, testified that the applications were rejected because the men "were not qualified" (R. 29; 109-110). However, since the applicants were blackballed in a general meeting of the membership, without being referred to the union's examining board which passes upon the work qualification of the various applicants, the Board rejected this explanation (R. 29; 112). The Board concluded that the reason for the rejection was more accurately reflected in the business agent's candid testimony that "we have built up this trade and must maintain it . . . It isn't the employer's trade . . . ," and that of late years "the pickings" have been "pretty slim" as the work on the waterfront has run approximately one-half a man per day (R. 29, n. 4; 109).

Sometime in January 1950, he spoke to Ben Bradley, the Company's superintendent, about obtaining work and was told by Bradley that there was a job for him if he could secure clearance from the Union (R. 29-30; 79, 100-102). When Lennox called business agent Gagner, the latter refused to issue him a permit, stating that "he was bringing in men from Portland and Bremerton, and that there was no work for permit men" (R. 30; 79-80). Shortly thereafter, Superintendent Bradley again told employee Lennox about a specific job he could have if the Union would clear him (R. 30; 80, 101). At the request of Lennox, Bradley himself called Business Agent Gagner and asked that Lennox be assigned to this particular job (R. 30; 101-102). Gagner refused, stating that "he wasn't going to put out any more permit men" (*ibid*). In another telephone conversation at this time in which Lennox informed Gagner of work available on a specific ship, the latter again stated that "he wasn't prepared to put permit men to work and [that] he was getting ample men from Portland and Bremerton" (R. 30; 80). Thus, Lennox has been unable to secure employment in the industry in which he had earned his livelihood since 1942 (R. 30; 78, 81).

On December 24, 1949, when employee Marvin Rosand was employed on an insulation job for the Company, the Union's business agent advised Superintendent Bradley that Rosand was to be replaced by a card man (R. 30; 98, 103). Bradley accordingly laid off Rosand and replaced him thereafter with a card man (R. 30; 103). Rosand, having heard that the Union would no longer issue permits, has not since asked for

work in the industry and has never been assigned by the Union to any job (R. 30; 98). He has returned to his former occupation of pile driver (R. 30; 97).

On February 8, 1950, employees Eskola, Kangas, Vollan, and Lucy were all employed by the Company on insulation work which it was installing on the *U. S. S. Freeman,* an Army transport ship (R. 30; 83-84, 89, 92, 95, 102). When the Company decided to reduce its staff on that job, Superintendent Bradley informed business agent Gagner of the impending layoff and inquired how it should be carried out (R. 30-31; 102). Gagner decreed that the permit men be dropped first, and in accordance with these instructions, the following day all the permit men were laid off, even though some of the card men who remained at work had less seniority on the job (R. 31; 102-103, 114-115, 84, 92-93, 96). In effecting the layoff, Superintendent Bradley told employees Kangas, Vollen and Lucy that the Union's business agent had requested that the permit men be laid off (R. 31; 89, 91, 92-93, 96).

Since that date, February 8, 1950, no permit men have been assigned work in the insulation field by the Union, even though such work has been available (R. 31; 90, 110-111). Thus, business agent Gagner has faithfully adhered to the no-permit policy which he had announced to two of the permit men who had requested clearance for jobs (R. 31; 93, 96-97).

II. The Board's Conclusions of Law

The Board found that, in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act, the Union had refused to issue work permits to the six named employees and,

pursuant to the illegal closed-shop provision of the agreement, had required the Company to layoff or refuse to hire these six employees because they did not have such work permits (R. 46, 36). Although the closed-shop agreement had been entered into before the amendments to the Act, and was therefore valid at its inception, it had been "renewed or extended" thereafter by operation of the automatic renewal clause of the agreement, and upon such renewal its continuing validity ceased under the express provisions of Section 102 of the Act (R. 46-48, 32-34). The provision in the agreement for the arbitration of differences arising from the request of either party to modify or change it at specified intervals is immaterial to the question whether a renewal or extension of the agreement has been effected (R. 47-48).

III. The Board's Order

The Board ordered the Union to cease and desist from (1) requiring the enforcement of the closed-shop provision of its existing contract with Seattle Construction Council, (2) causing the Council and its members, including the Company, to discriminate in regard to the hire and tenure of employment of persons who are not members of the Union, and (3) restraining or coercing employees in the exercise of their right to refrain from concerted activities (R. 49-50). Affirmatively, the Board ordered the Union to notify the Seattle Construction Council and its members, including the Company, that it no longer considers the union-security provisions of the contract to be in effect or binding upon the parties, and that it withdraws its objections to the em-

ployment of the six named employees (R. 50). The Board also ordered the Union to make whole these employees for any loss of pay caused by the discrimination against them, and to post appropriate notices (R. 50-51).

SUMMARY OF ARGUMENT

By requiring the Company to lay off or refuse to hire the six named employees because of their non-membership in the Union or lack of union clearance, the Union clearly violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act. The closed-shop contract to which the Company and the Union are parties does not justify these discriminatory acts, since, although entered into prior to the enactment of the 1947 amendments to the Act, which proscribe such a contract, the contract was thereafter "renewed or extended" within the meaning of Setion 102 to the Act, so that the validity of the contract had ceased before the discrimination occurred. The renewal or extension of the contract resulted from the operation of the contract's clause, which provided that unless notice of a desire to effect a change was given by one of the parties within a prescribed time, the contract was "to continue in effect thereafter from year to year." Since neither party served the other with the prescribed notice subsequent to the enactment of the amendments to the Act, the contract "renewed or extended" itself upon the date provided for therein. That the parties contemplated a renewal becomes evident upon examination of the wage termination provision, which, identical in effect and operation to the general termination clause, speaks explicitly in terms of "*renew(al)* . . . from year to year." (Emphasis

supplied.) The provisions in the agreement for the arbitration of proposed changes upon which the parties are unable to agree is immaterial to the question whether a renewal or extension of the agreement has been effected.

ARGUMENT

In Violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act, the Union Required the Company to Lay Off or Refuse to Hire Six Named Employees Pursuant to an Invalid Closed-Shop Agreement.

As shown (*supra,* pp. 7-10), the Union refused to issue work permits to the six named employees and, pursuant to the closed-shop provision of the agreement, required the Company to lay off or refuse to hire these individuals because they did not have such permits. Thus, the Union refused to clear employee Lennox for work, even at the request of the Company's superintendent, effected the replacement of employee Rosand with a member of the Union, and caused the layoff of the four other permit men because of their nonmembership in the Union. Added to these incidents of discrimination are the repeated statements of the Union's business agents that no permit men would be put to work, and the Union's faithful adherence to this practice of no clearance for such workers. By its conduct, the Union unquestionably caused the Company to discriminate against employees, in violation of Section 8 (b) (2) of the Act, and restrained and coerced the employees because of their lack of membership in the Union, in violation of Section 8 (b) (1) (A) of the Act,[6] unless

[6] E.g., *N.L.R.B.* v. *Newspaper and Mail Deliverers' Union,* 192 F. 2d 654 (C.A. 2); *N.L.R.B.* v. *Peerless Quarries, Inc.,* 29 LRRM 2262 (C.A. 10, Dec. 31, 1951); *Union Starch & Refining Co.* v.

at the time the discrimination was practiced the closed-shop agreement continued to retain its validity.

Section 102 of the Act expressly stipulates that the closed shop provision of an agreement entered into before the enactment of the amendments ceases to be valid when the agreement is thereafter "renewed or extended." Its explicit wording is as follows:

> . . . the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment but prior to

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N.L.R.B., 186 F. 2d 1008 (C.A. 7), cert. denied, 342 U.S. 815; *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686 (C.A. 2), cert. denied, 338 U.S. 954; *United Mine Workers* v. *N.L.R.B.* 184 F. 2d 392 (C.A.D.C.), cert. denied, 340 U.S. 934.

Before the Board, the Union urged three factual contentions to exonerate itself from the charge of discrimination, all of which were decided adversely to it by the Board, and the evidence in support of the Board's findings are indisputably substantial considering the whole record. First, the Union urged that it did not insist upon or cause the layoff or refusal to hire the six employees, the Company itself being solely responsible for those acts. The testimony of the Union's business agents, upon which this contention is based, conflicts with the disinterested testimony of superintendent Bradley, the testimony of the six employees, and the overt circumstances (R. 35). Second, the Union urged that when the six employees called the Union's business agents for jobs, there was no work available to which they could be assigned. This again presented a conflict between the testimony of the business agents and that of Bradley and the six individuals, and was also inconsistent with the increase in ship construction and repair (R. 35). Third, the Union urged that the men were not qualified as insulation workers, especially with respect to uptown as contrasted with shipyard work. In view of the fact that these men had been earning their livelihood at such work since the early part of the war, of the high regard in which their work was held by superintendent Bradley, and their known ability to handle all types of insulation work, this contention is without merit.

> the effective date of this title, if the performance of such obligations would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, *unless such agreement was renewed or extended subsequent thereto.* (Emphasis supplied.)

In this case the Board held that, by operation of the automatic renewal provisions of the agreement, it had been renewed or extended after the amendments and before the acts of discrimination occurred, so that no legal closed-shop agreement was in existence validating the discrimination.

At pages 11 to 21 of the Board's brief before this Court in *N.L.R.B.* v. *Clara-Val Packing Company,* 191 F. 2d 556, to which the Court is respectfully referred,[7] the Board identified the elements of an automatic renewal clause and stated the reasons why an agreement running for an additional term by virtue of it was "renewed or extended" within the meaning of Section 102 of the Act. Without repeating the details of the analysis, it suffices to restate that the elements of an automatic renewal clause are (1) a specified period which ordinarily is the only time that changes or modifications of the contract may be negotiated, (2) a specified date by which time notice must be given by either party wishing termination or modification, (3) the signification, by absence of timely notice, that the contract will bind the parties for an additional specified term. Once an agreement runs for an addi-

[7] A copy of the Board's *Clara-Val* brief has been furnished counsel for the Union.

tional period because of automatic renewal, it has been "renewed or extended," for Congress intended to defer the invalidity of a closed-shop agreement only for the balance of its unexpired term, and the expiration occurs when the period prescribed by the contract for the negotiation of changes arrives.

In *Clara-Val* this Court evidently agreed that a contract which acquires an additional term by virtue of the operation of an automatic renewal clause has been "renewed or extended" within the meaning of Section 102. This Court held, however, that the agreement in question in *Clara-Val* did not provide for automatic renewal, for the agreement provided that it "shall continue without expiration date until" specified events (191 F. 2d, at 558), and such an agreement "is not terminated on its anniversary where the parties take no action" (191 F. 2d, at 559). This Court distinguished this form of agreement from a true automatic renewal in the following manner (191 F. 2d, at 558):

> In the Matter of Mill B., 40 NLRB 346, 348, the contract provided "this agreement is for one year." In the Matter of Green Bay Drop Forge Co., 57 NLRB 1417, 1419, the contract provided that it "shall remain in effect for one year and for renewal periods of one year thereafter" (emphasis supplied). Similarly in United States Pipe and Manufacturing Co., 78 NLRB 15, 16. In Groveton Papers Co., 52 NLRB 1256, 1257, the contract was expressly made a "year to year" contract. In each of the following cases the contract was for a specific period of a year and for "year to year" thereafter: Borg-Warner Corp., 58 NLRB 449, 450; Narranganset Electric Co., 64 NLRB 1492, 1493; Neon Products, Inc., 74 NLRB 766, 767;

Manhattan Coil Corp., 79 NLRB 187, 189; North Range Mining Co., 47 NLRB 1306, 1307; Little Rock Mfg. Co., 80 NLRB 65.

In Patrick Cudahy Family Co. v. Bowles, 138 F. 2d 574, 575 (Cir. 1) the contract expressly provided for a *renewal*. It was for a definite two year period, to be renewed on identical terms for a like successive period.

The agreement in this case falls squarely within the pattern of agreements distinguished in *Clara-Val*.

Thus, the clause of the agreement governing the duration of all employment conditions except wages provided that, after it took "effect on July 1, 1943," it was to last *"from year to year,"* subject to notice of a desire to negotiate changes which may be given ninety days prior to each anniversary date (*supra,* p. 5). Accordingly, the language "year to year" which this Court regarded as pivotal in *Clara-Val* appears in this agreement. Any doubt is dispelled by reference to the clause governing the duration of the wage provision. It stipulated that the wage provision "shall remain in effect until January 1, 1948 unless notice is given 90 days prior to July 1, 1947 and shall *renew itself from year to year thereafter*" (*supra,* p. 5). The wage duration is thus explicitly couched in the language of renewal, a factor which this Court emphasized in *Clara-Val*. In the present agreement, the only significant difference between the clauses governing the duration of wages and other employment conditions is that the initial period during which the wage provision may not be changed is longer than that pertaining to the other terms of employment. Of course, this

distinction is immaterial to the character of the renewal which prevails after the initial period expires.

It is clear, therefore, that the agreement in this case contains a true provision for automatic renewal as this Court conceived it in *Clara-Val.* The amendments to the Act became effective on August 22, 1947; thereafter, the wage provision of the agreement was automatically renewed on January 1, 1948, and the other provisions were automatically renewed on July 1, 1948; and the acts of discrimination occurred between December 1949 and February 1950. Accordingly the unfair labor practices took place at a time when the closed-shop agreement no longer validated their commission.

Before the Board, the Union contended that a renewal or extension of the agreement was precluded by the provision in the agreement for the final and binding arbitration of any requested changes on which the parties were unable to agree, the Union's theory evidently being that the agreement was thereby perpetual in form on the ground that no break in contractual relations could occur.[8] The fallacies in this contention are manifold. First, the contractual availability of arbitration does not obliterate the fact that the closed-shop provision of the agreement existed "from year to year." At a specified interval each year, it is subject to change upon the giving of timely notice, and it is the failure to give this notice, not the availability of arbitration, which prolongs the life of the

[8] The Board held in accordance with the Union's contention that all provisions of the agreement were subject to settlement by arbitration (R. 46-47). The examiner, however, had held that wage disagreements were not arbitrable under the contract, and therefore the Union's contention failed because "an essential feature of this contract would expire in the event of an unsettled dispute over changes therein" (R. 34).

closed-shop provision for at least another year. Second, accord reached by arbitration effects a renewal or extension of an agreement in no different sense than accord reached by direct negotiation. It does not mean that a renewal or extension has not been made merely because an assured means of bringing it about has been provided. Third, it is not true that the availability of arbitration prevents a break in contractual relationships. The time consumed by arbitration may extend beyond the anniversary date of the agreement, and in the absence of an interim agreement, a break in contractual relations may eventuate. Fourth, since under the arbitral scheme the selection of the third umpire by the U. S. Department of Conciliation is subject to the approval of both parties (*supra,* p. 6), a failure to agree on this subject may prevent arbitration at the threshold, so that on this additional ground a break in contractual relations may in fact take place.

In short, the means by which an agreement acquires an additional term, whether by automatic renewal, direct negotiation, settlement by mediation, or decision by arbitration, is immaterial to whether a renewal or extension of the agreement has been effected within the meaning of Section 102 of the Act. In this case, the agreement having been renewed or extended by automatic renewal, the Board properly found that its closed-shop provision no longer validated the discrimination practiced.[9]

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[9] Before the Board, the Union contended that because charges of discrimination were filed by employees Lennox, Eskola, Kangas and Rosand, but not by employees Lucy and Vollan, the Board erroneously received evidence pertaining to the discrimination practiced against employees Lucy and Vollan. It is settled that the charges of discrimination filed by the four employees suffices to support the complaint and ensuing prosecution pertaining to all

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.[10]

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six. *N.L.R.B.* v. *Globe Wireless, Ltd.*, 29 LRRM 2319, 2321-2322 (C.A. 9, December 27, 1951); *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 415-416 (C.A. 10); *N.L.R.B.* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C.A. 5); *N.L.R.B.* v. *Kingston Cake*, 191 F. 2d 563, 567 (C.A. 3); *Cusano* v. *N.L.R.B.* 190 F. 2d 898, 903-904 (C.A. 3); *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C.A. 7).

[10] A week after the Board's decision issued, the Union petitioned the Board to reconsider and to re-open the record, alleging that after October 18, 1950 it abandoned the permit system and had so notified all employers, including the Company (R. 54-56). It argued that these additional facts rendered moot several items of affirmative action required by the Board and made necessary an amendment to the rule for computing the loss of pay. Such alleged facts, indicative of partial compliance, could not render the Board's order moot (*N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563; *N.L.R.B.* v. *Pool Mfg. Co.*, 339 U.S. 577; and insofar as back pay is concerned, the Board's decision as it now stands explicitly states the conditions to be met in order for the Union to toll its liability for back pay (R. 48). Whether the action the Union alleges it has taken meets those conditions should be resolved, assuming amicable efforts at adjustment fail, in compliance proceedings after the entry of an enforcement decree. *N.L.R.B.* v. *Bird Machine Co.*, 174 F. 2d 404 (C.A. 1); *Wallace Corp.* v. *N.L.R.B.*, 159 F. 2d 952 (C.A. 4); *N.L.R.B.* v. *New York Merchandise Co.*, 134 F. 2d 949 (C.A. 2). Accordingly, the Board's denial of the Union's motion (R. 56-57) was proper.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such

agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership

in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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